

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

- against -

ORDER
13-CV-5584 (RRM) (RLM)

CKB168 HOLDINGS, LTD., et al.,

Defendants.

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ROSLYNN R. MAUSKOPF, United States District Judge.

By two separate motions, plaintiff Securities and Exchange Commission (“SEC”) moved for sanctions pursuant to Federal Rule of Civil Procedure 37 against defendants Hyng Wai (Howard) Shern (“Shern”), Rui Ling (Florence) Leung (“Leung”), CKB168 Holdings Ltd., WIN168 Biz Solutions Ltd., CKB168 Ltd., CKB168 Biz Solutions Inc., and Cyber Kids Best Education Ltd. (together, the “foreign defendants”). (Doc. Nos. 193, 201.) At issue here is the SEC’s second motion, which requested sanctions and an adverse inference jury instruction based on the foreign defendants’ failure to produce corporate records relating to any planned initial public offering (“IPO”).

Magistrate Judge, the Honorable Roanne L. Mann, issued a Report and Recommendation (“R&R”) recommending that the SEC’s motions be granted. (Doc. No. 214.) Shortly thereafter, the SEC was able to recover relevant information from a hard drive produced by the foreign defendants, but such information did not include communications or records relating to the purported IPO. (SEC’s Letter, Jul. 17, 2015, (Doc. No. 256) at 3.) By Order entered August 12, 2015, this Court agreed to recommendations in the R&R, but referred the issue of the adverse inference instruction back to Judge Mann for further consideration in light of the new information recovered from the hard drive. On September 8, 2015, the SEC submitted an amended motion, renewing its previous

requests. (Doc. No. 276.) On November 3, 2015, Judge Mann issued an R&R recommending that the SEC's renewed motion be granted in substantial part. (Doc. No. 295.) Defendants Shern and Leung both filed objections, and the SEC responded. (Doc. Nos. 229, 300, 331.)

On December 1, 2015, significant changes to Rule 37 went into effect. Relevant to this case, the revised rule instructs that the Court "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: instruct the jury that it may or must presume the information was unfavorable to the party." Fed. R. Civ. P. 37(e)(2)(B). In light of this change, Judge Mann issued an Order to Show Cause directing the SEC, Shern, and Leung to file submissions addressing the impact of the Rule revision. (Doc. No. 330.)

On February 2, 2016, Judge Mann issued a modified R&R recommending that the SEC's amended motion for sanctions against defendants Shern and Leung be denied without prejudice, with the right to renew in the event that the case proceeds to trial and the SEC attempts to make the requisite showing of intent based on the evidence adduced at trial. (Doc. No. 338.) No party has filed any objection.

In the most recent R&R, Judge Mann reasoned that there were two plausible explanations for the lack of information about the purported IPO: either the information had existed and the foreign defendants had destroyed or otherwise failed to preserve such information; or the information simply never existed. (R&R, Feb. 2, 2016, (Doc. No. 338) at 6.) Judge Mann found, and the Court agrees, that the evidence does not show that the foreign defendants destroyed or failed to preserve the evidence at issue – "simply put, there is strong likelihood that the materials never existed." (*Id.* at 8.) As such, "the existing record is not sufficiently clear to support the factual findings" required by the revised Rule 37. (*Id.*)

Pursuant to 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72, the Court has reviewed the R&R for clear error and, finding none, concurs with the R&R in its entirety. *See Covey v. Simonton*, 481 F. Supp. 2d 224, 226 (E.D.N.Y. 2007).

Accordingly, it is hereby ORDERED that the R&R (Doc. No. 338) is adopted in its entirety.

The Clerk is requested to email copies to defendants Shern and Leung at the following addresses:

For defendant Shern: Hshern@hotmail.com

For defendant Leung: Florence_Leung@hotmail.com

SO ORDERED.

Roslynn R. Mauskopf

Dated: Brooklyn, New York
September 28, 2016

ROSLYNN R. MAUSKOPF
United States District Judge